*UNITED STATES DISTRICT COURT*

*DISTRICT OF MAINE*

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| ***DEANA ROMEIKA,*** | ***)*** | |
| | ***)*** | |
| ***Plaintiff*** | ***)*** | |
| | ***)*** | |
| ***v.*** | ***)*** | ***Docket No. 02-230-P-H*** |
| | ***)*** | |
| ***OXFORD COUNTY SHERIFF'S*** | ***)*** | |
| ***DEPARTMENT, et al.,*** | ***)*** | |
| | ***)*** | |
| ***Defendants*** | ***)*** | |

***RECOMMENDED DECISION ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT***

The defendants, Oxford County, the Oxford County Sheriff's Department and Charles P. Taylor, move for summary judgment in this action arising out of a telephone conversation between the plaintiff and defendant Taylor. I recommend that the court grant the motion.

**I. Summary Judgment Standard**

Summary judgment is appropriate only if the record shows "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute over it is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party.'" *Navarro v. Pfizer Corp.*, 261 F.3d 90, 93-94 (1st Cir. 2001) (quoting *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995)).

The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Nicolo v. Philip Morris, Inc.*, 201 F.3d 29, 33 (1st Cir. 2000). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, the nonmovant must "produce specific facts, in suitable evidentiary form, to establish the presence of a trialworthy issue." *Triangle Trading Co. v. Robroy Indus., Inc.*, 200 F.3d 1, 2 (1st Cir. 1999) (citation and internal punctuation omitted); Fed. R. Civ. P. 56(e). "As to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." *In re Spigel*, 260 F.3d 27, 31 (1st Cir. 2001) (citation and internal punctuation omitted).

**II. Factual Background**

The statements of material facts submitted by the parties pursuant to this court's Local Rule 56 establish the following undisputed material facts.

The plaintiff and David Romeika ("David") are married and currently reside at their home in Hiram, Maine. Defendant's [sic] Statement of Material Facts ("Defendants' SMF") (Docket No. 12) ¶ 1; Plaintiff's Amended Opposition to Statement of Material Facts ("Plaintiff's Responsive SMF") (Docket No. 23) ¶ 1. They separated in June 2000 and on November 4, 2000 David was living in Fryeburg. *Id.* ¶ 3. David called the plaintiff on November 3, 2000 and during the conversation asked if she would like him to come over, to which she responded in the affirmative. *Id.* ¶ 4. David stayed overnight and on the morning of November 4, 2000 he and the plaintiff began to argue. *Id.* ¶ 5. The plaintiff called the police as a result of the argument. Plaintiff's Additional Statement of Material

Facts ("Plaintiff's SMF") (Docket No. 17) ¶ 11; Defendants' Response to Plaintiff's Additional Statement of Material Facts ("Defendants' Responsive SMF") (Docket No. 20) ¶ 11. The plaintiff's call to the Oxford County Regional Communication Center was received at 11:24 a.m. Defendants' SMF ¶ 7; Plaintiff's Responsive SMF ¶ 7.

The call was received by dispatcher Susan Creswell. *Id.*¶ 8. The plaintiff informed Creswell that David was at the house and was refusing to leave. *Id.* ¶ 30. She did not tell Creswell that she suffered from mental illness or that she had a disability. *Id.* ¶ 29. Creswell transferred the call to defendant Taylor, a part-time Oxford County sheriff's deputy. *Id.* ¶¶ 9-10. Creswell would have transmitted the information that she received from the plaintiff, as well as Creswell's classification of the call as an "unwanted person," to Taylor. *Id.* ¶ 33. Taylor had received training concerning how to deal with people who have mental disabilities. *Id.* ¶ 11. David testified that the plaintiff told Taylor that her husband was with her and would not leave, that he had a place of his own and she had asked him to leave. *Id.* ¶ 12. During the conversation between the plaintiff and Taylor, David was "spouting off in the background" and may have said, "She's crazy." *Id.* ¶ 13. The plaintiff claims that she told Taylor that she had a psychiatric background. *Id.* ¶ 40. She testified that this was the only information she gave Taylor concerning her psychiatric condition. *Id.* She did not tell Taylor that there had been any violence or any threats of violence, because David had not made any such threats. *Id.* ¶ 34. In response to his question, the plaintiff told Taylor that she was physically okay. *Id.* ¶ 35. She did not advise Taylor that any violence was about to occur. *Id.* ¶ 56.

At some point David got on the phone at Taylor's request. *Id.* ¶ 14. David remembers that Taylor asked him if he was planning on leaving, to which he responded, "Yes, in twenty minutes to half an hour." *Id.* He recalls that he and Taylor had some discussion about David's babysitting their daughter and about his wife's indecision about whether he should stay or go. *Id.* ¶¶ 15, 18. He

testified that while he was conversing with Taylor the plaintiff stated, "Well, good, now you're going to leave, what am I going to do for a babysitter." *Id.* ¶ 15. David stated that Taylor heard the plaintiff make this statement. *Id.* Taylor "identified" that the plaintiff stated that if David did not babysit, she would lose her job; apparently, she was yelling this in the background while David was on the phone with Taylor. *Id*. ¶¶ 36, 37. Taylor told David that he "was better off leaving." *Id*. ¶ 15. He told David that he ought to leave because the plaintiff's problems would become David's problems, whether the plaintiff's problems were "perceived or real." Plaintiff's SMF ¶ 65; Defendant's Responsive SMF ¶ 65. David said that Taylor told him "I really don't want to come out if you're planning on leaving." *Id*. ¶ 34.

David testified that after speaking with Taylor, he was moving boxes out of the house and putting them into his car when the plaintiff blocked his path. Defendant's SMF ¶ 21; Plaintiff's Responsive SMF ¶ 21. After asking the plaintiff to move a couple of times, David pushed her with a box. *Id*. He said that this event took place within 15 to 30 minutes after the telephone conversation with Taylor and, in any event, before 12:00 noon. *Id*. The plaintiff reported this assault to the Oxford County Sheriff's Department on November 6, 2000. *Id*. ¶ 50.

Taylor decided not to respond to the November 4 call because he determined that David was not an unwanted person, given the information that he received, and did not believe that a crime was being committed. *Id*. ¶ 44. If Taylor had responded to the call, he could not have made it to Hiram from South Paris in less than an hour. *Id*. ¶ 48.[1] Taylor testified that his response to the call would not have been affected if a disability had been reported to him. *Id*. ¶ 45. He claims that, as a general

[1] The plaintiff purports to qualify her response to this paragraph of the defendant's statement of material facts, stating as follows: "Although Deputy Taylor might not have been able to reach Hiram from his location in under an hour, he testified that in such situations, assistance may be sought from state police troopers." Plaintiff's Responsive SMF ¶ 48. This additional factual information is more appropriately presented in a party's statement of additional material facts rather than as a qualification to a paragraph of a moving party's statement of material facts, but in any event the lack of any indication of how long it would have taken a state trooper to reach (*continued on next page*)

matter, he would not give more or less weight to what a person was telling him based on the fact that the person had a psychiatric disability. Plaintiff's SMF ¶ 46; Defendant's Responsive SMF ¶ 46. Neither the plaintiff's journal not her statement about David's assault on her mentions that she told Taylor during the telephone conversation that she had a psychiatric background. Defendant's SMF ¶¶ 46-47; Plaintiff's Responsive SMF ¶¶ 46-47.

The plaintiff was satisfied with the response of the Oxford County Sheriff's Department to calls she had made before November 4, 2000. *Id*. ¶ 27. On November 16, 2000 the plaintiff contacted the Oxford County Sheriff's Department to make a complaint about how her November 4, 2000 call had been handled. *Id*. ¶ 51. After talking with Lieutenant Quinn, the plaintiff did not file a written complaint. *Id*. ¶¶ 51-52.

As of November 4, 2000 the plaintiff was able to work part-time at Wal-Mart and could do her own housework and care for her children most days, drive a car and read and write without problems. *Id*. ¶ 26. The plaintiff has been regularly treated by a psychiatrist for roughly 10 years. Plaintiff's SMF ¶ 92; Defendant's Responsive SMF ¶ 92. She has been diagnosed as having major depressive disorder. *Id*. ¶ 93.

## III. Discussion

The second amended complaint alleges violations of the Americans with Disabilities Act ("ADA"), 42 U.S.C. §12100 *et seq*. (Count I); the Rehabilitation Act, 29 U.S.C. § 794 ("Section 504") (Count II); the Fifth and Fourteenth Amendments to the United States Constitution (Count III); and the Maine Human Rights Act ("MHRA"), 5 M.R.S.A. § 4591 *et seq*. (Count IV). Counts I, II and IV appear to be asserted only against defendants Oxford County and the Oxford County Sheriff's Department. Second Amended Complaint (Docket No. 8) ¶¶ 36-39, 42-44, 51, 53. Count III appears

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the plaintiff's house or how likely it was that a state trooper would be available and willing to assist the plaintiff in removing her husband
(*continued on next page*)

to be asserted only against defendant Taylor. *Id*. ¶¶ 46-48. The defendants seek summary judgment on all counts.

### A. Discrimination (Counts I, II and IV)

The plaintiff's claims under the ADA, Section 504 and the MHRA are based on her alleged psychiatric disability. Title II of the ADA, which prohibits discrimination against persons with disabilities by public entities, "is modeled on § 504 of the Rehabilitation Act," and courts in the First Circuit will "rely interchangeably on decisional law applying § 504" in applying Title II of the ADA. *Parker v. Universidad de Puerto Rico*, 225 F.3d 1, 4 (1st Cir. 2000). Title II of the ADA is the portion of the ADA invoked by the plaintiff in this case. Second Amended Complaint ¶ 34. This court will not distinguish between the ADA and the MHRA in analyzing the plaintiff's claims under the two statutes as to their scope and general intent "because Maine courts consistently look to federal law in interpreting state anti-discriminatory statutes." *Ridge v. Cape Elizabeth Sch. Dep't*, 77 F.Supp.2d 149, 167 (D. Me. 1999) (citation omitted). The parties agree that the legal analysis of all three claims in this case is the same. Defendants' Motion for Summary Judgment, etc. ("Motion") (Docket No. 11) at 9-10; Plaintiff's Opposition to Defendants' Motion for Summary Judgment, etc. ("Opposition") (Docket No. 15) at 2 n.1.

The defendants contend that the plaintiff cannot establish that she is a qualified individual with a disability and thus able to invoke the protection of the statutes at issue, that she had not presented sufficient evidence of intentional discrimination to allow her to recover compensatory damages and

from the house makes this information insufficient to affect the outcome of the pending motion.

that she may not seek injunctive relief under the circumstances of this case.[2] Motion at 8-19. It is not necessary to determine whether the plaintiff can establish her status as a person entitled to invoke the protections of the statutes at issue because, assuming that she can do so, she nevertheless does not offer sufficient evidence to allow a factfinder to consider her claims for compensatory damages or injunctive relief.

The defendants contend, Motion at 13, and the plaintiff does not dispute, Opposition at 9, that the plaintiff must show intentional discrimination by an agent of either of the government-agency defendants in order to recover compensatory damages under any of the three statutory schemes at issue. *See Ferguson v. City of Phoenix*, 157 F.3d 668, 674 (9th Cir. 1998) ("in the absence of proof of discriminatory animus, compensatory relief should not be allowed" under Title II of the ADA or section 504). In this case, the plaintiff argues that intentional discrimination may be inferred from Taylor's failure "to respond to [her] call for help" and from his failure to classify her call as a "domestic dispute," which would require an immediate in-person response by a law enforcement officer under the policy of the sheriff's department, Plaintiff's SMF ¶¶ 48-49, rather than as an "unwanted person," *id*. ¶ 79, which did not require such a response, Opposition at 11 & n.4. Neither inference could be drawn by a reasonable jury without resorting to speculation. A failure to respond, standing alone, is not evidence of discriminatory animus. Taylor was not presented with any evidence of violence or threats of violence, Defendants' SMF ¶ 34; Plaintiff's Responsive SMF ¶ 34, which are elements of a "domestic" call under the written policy of the Oxford County Sheriff's Department, Defendants' Responsive SMF ¶ 48.

Even in cases in which intent is at issue in connection with a motion for summary judgment, "summary judgment is appropriate if the non-moving party rests merely upon conclusory allegations,

[2] The second amended complaint seeks declaratory and injunctive relief, compensatory damages and civil penal damages under the (*continued on next page*)

improbable inferences, and unsupported speculation." *Benoit v. Technical Mfg. Corp.*, 331 F.3d 166, 173 (1st Cir. 2003) (citation and internal quotation marks omitted). Here, the only evidence offered by the plaintiff in support of her position is that she told Taylor that she had a "psychiatric background," Defendant's SMF ¶ 40; Plaintiff's Responsive SMF ¶ 40, and that Taylor told David he should leave the house because the plaintiff's "problems would become [David's] problems whether her problems were 'perceived or real,'" Plaintiff's SMF ¶ 65. To infer from these two facts that Taylor decided not to go to the plaintiff's house because he perceived the plaintiff as having a psychiatric disability would be to base a legal conclusion on "a barebones allegation wrapped in the gossamer strands of speculation and surmise," *Podiatrist Ass'n, Inc. v. La Cruz Azul de Puerto Rico, Inc.*, 332 F.3d 6, 17 (1st Cir. 2003), which this court may not do. It may not reasonably be inferred from the mere fact that Taylor was aware that the plaintiff had a psychiatric background that Taylor discriminated against the plaintiff based on a disability. Nor can Taylor's remark to David reasonably be interpreted to suggest that Taylor had made a judgment call about whether the plaintiff's "problems" were "real or perceived." Indeed, the remark is totally neutral in meaning and tone. In order for a jury to conclude from the two facts together that Taylor did not go to the plaintiff's house as a result of discriminatory animus based on her disability it would have to engage in sheer speculation. The defendants are entitled to summary judgment on the plaintiff's demands for compensatory relief set forth in connection with Counts I, II and IV of the second amended complaint.

With respect to the plaintiff's demand for injunctive relief in connection with the same counts, the defendants contend that the specific terms of the relief sought in the second amended complaint are unavailable as a matter of law and that the plaintiff cannot show that she would suffer irreparable harm in the absence of such relief. Motion at 17-19. The second assertion is dispositive.

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MHRA. Second Amended Complaint ¶ 2 & at 9.

In considering a request for injunctive relief,

> [t]he court must consider the plaintiff[']s likelihood of success on the merits, whether the plaintiff[] would suffer irreparable harm without an injunction, the appropriate "balance" of harms to the plaintiff[] and the defendants, and the effect upon the public interest.

*Conservation Law Found., Inc. v. Busey*, 79 F.3d 1250, 1271 (1st Cir. 1996). The defendants focus on the second element of this test. There must be "a real threat of future violation or a contemporary violation of a nature likely to continue or recur." *Lovell v. Brennan*, 728 F.2d 560, 562 (1st Cir. 1984) (quoting *United States v. Oregon State Med. Soc.*, 343 U.S. 326, 333 (1952)). The plaintiff contends that she meets this requirement because the town where she resides "does not have its own police" and she "could find herself needing police services again" from the sheriff's department. Opposition at 11. However, neither of these factual assertions is supported by an entry in the plaintiff's statement of material facts. This omission is fatal to her claim for injunctive relief. Even if these assertions could be considered, however, I have already determined that the plaintiff cannot recover on the merits of her claim, on the showing made. The defendants are thus entitled to summary judgment on any claim for injunctive relief in connection with Counts I, II and IV.

The remaining claims for relief associated with these counts set forth in the second amended complaint are for declaratory relief, nominal damages and civil penal damages under the MHRA. Second Amended Complaint at 9. In the absence of any substantive claim upon which relief is otherwise available, the requests for nominal and civil penal damages cannot sustain these counts. Declaratory relief is not available in the absence of evidence of "a sufficient likelihood that [the plaintiff] will again be wronged in a similar way." *Brown v. Hot, Sexy & Safer Prods., Inc.*, 68 F.3d 525, 539 (1st Cir. 1995) (quoting *City of Los Angeles v. Lyons*, 461 U.S. 95, 104-06 (1983)). No such showing has been made here, and the defendants are accordingly entitled to summary judgment on all aspects of Counts I, II and IV.

### B. Equal Protection (Count III)

This count is asserted only against Taylor, the individual defendant. Opposition at 14. He contends that the lack of evidence of a discriminatory motive is fatal to this claim and, in the alternative, that (i) there was a rational basis for his decision not to respond in person to the plaintiff's call, (ii) his action caused no constitutional deprivation and (iii) he is entitled to qualified immunity on the claim. Motion at 20-25. The court need consider only the first argument.

In order to establish an equal protection violation, a plaintiff "must adduce competent evidence of purposeful discrimination." *Hayden v. Grayson*, 134 F.3d 449, 453 (1st Cir. 1998) (citation and internal quotation marks omitted).

> The burden is an onerous one: "Discriminatory purpose" implies that the decisionmaker selected or reaffirmed a course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group.

*Id*. (citation and internal punctuation omitted). As discussed above, the plaintiff in this case offers nothing beyond speculation to support the existence of purposeful discrimination by Taylor. That is not any more sufficient in the context of an equal protection claim than it is in the context of a statutory claim under the ADA or section 504. *E.g., Yerardi's Moody St. Rest. & Lounge, Inc. v. Board of Selectmen of Town of Randolph*, 932 F.2d 89, 92 (1st Cir. 1991). Taylor is entitled to summary judgment on Count III.

## IV. Conclusion

For the foregoing reasons, I recommend that the defendants' motion for summary judgment be **GRANTED**.

***NOTICE***

***A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for***

***which de novo review by the district court is sought, together with a supporting memorandum and request for oral argument before the district judge, if any is sought, within ten (10) days after being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.***

***Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.***

Dated this 26th day of August 2003.

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David M. Cohen
United States Magistrate Judge

**Plaintiff**

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V.

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